Office-Supreme Court, U.S.
FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1085

In The
Supreme Court of the United States
October Term, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JEAN KELLEY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James K. Hayner
Tom Scribner
Minnick, Hayner & Zagelow, P.S.
P.O. Box 1757
Walla Walla, Washington 99362
Counsel of Record

January 19, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

21

QUESTIONS PRESENTED

1. Whether (a) the decisions below are contrary to the decisions from other courts, (b) there is need for a uniform rule on point, or (c) the case at bar involves principles which are of importance to the public at large or concern only the parties to this case.

2. Whether the federal courts' failure in a diversity action to provide standards for the review by Article III judges of proceedings before a magistrate under 28 U.S.C. § 636 violates Article III of the U.S. Constitution and denies due process to defendant.

3. Whether the federal courts' refusal on equitable grounds to invoke res judicata violates the federal court's obligation to give full faith and credit to a state court decision.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT:

1. Whether (A) The Decisions Below Are Contrary To The Decisions From Other Courts, (B) There Is Need For A Uniform Rule On Point, Or (C) The Case At Bar Involves Principles Which Are Of Importance To The Public At Large Or Concern Only The Parties To This Case. 2

2. Whether The Federal Courts' Failure In A Diversity Action To Provide Standards For The Review By Article III Judges Of Proceedings Before A Magistrate Under 28 U.S.C. § 636 Violates Article III Of The U.S. Constitution And Denies Due Process To Defendant. 3

3. Decisions Below Did Not Fail To Give Full Faith And Credit To The Decision Of A State Court For The Reason That State Law Allowed Kelley To Relitigate Her Case. Full Faith And Credit Need Not Be Given To A Judgment To Which The Laws Of The Issuing State Would Not Give Res Judicata Effect. 7

CONCLUSION 10

Appendix A ..... App. 1

Appendix B ..... App. 3

Appendix C ..... App. 5

TABLE OF AUTHORITIES

Pages

CASES:

Ackerman v. Ackerman, 676 F.2d 898 (2d Cir. 1982) 7

Commissioner v. Bilder, 369 U.S. 499, 501, 8 L.Ed. 2d 65, 82 S. Ct. 881 (1962) 3

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 69 L.Ed. 2d 103, 101 S. Ct. 2424 (1981) 8

Fields v. U.S., 205 U.S. 292, 296, 51 L.Ed. 807, 27 S. Ct. 543 (1907) 3

Kremer v. Chemical Construction Co., 456 U.S. 461, 72 L.Ed. 2d 262, 102 S. Ct. 1883 (1982) 7

Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 833 (9th Cir. 1982) 9

Newport News Shipbuilding & Drydock v. Director, 583 F.2d 1273, 1279 (4th Cir. 1978) 8

NLRB v. Pittsburg S.S. Co., 340 U.S. 498, 95 L.Ed. 479, 71 S. Ct. 453 (1951) 3

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 L.Ed. 2d 598, 102 S. Ct. 2858 (1982) 4

Planned Parenthood of Central and Northern Arizona v. State of Arizona, 718 F.2d 938, 949 (9th Cir. 1983) 9

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955) 3

Segal v. American Telephone & Telegraph Co., Inc., 606 F.2d 842, 845 (9th Cir. 1979) 8

Thomas v. Washington Gas Light Co., 448 U.S. 261, 270, 65 L.Ed. 2d 757, 100 S. Ct. 2644, 2655 (1980) 7

U. S. v. Raddatz, 447 U.S. 667, 65 L.Ed. 2d 424, 100 S. Ct. 2406 (1980) 4

TABLE OF AUTHORITIES—Continued

Pages

Western Baptist Home Mission Board v. Griggs, 284 Or. 204, 210, 433 P.2d 252, 255 (1967) 8, 9

Zucht v. King, 260 U.S. 174, 176, 67 L.Ed. 194, 43 S. Ct. 24, 25 (1922) 3

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. IV, § 1 7

STATUTES:

28 U.S.C. § 336 4

28 U.S.C. § 631 3

28 U.S.C. § 636 ..... 3, 5, 6

28 U.S.C. § 1254 3

28 U.S.C. § 1291 4

28 U.S.C. § 1738 7

Or. Rev. Stat. § 40.130 7

No. 84-1085

In The

Supreme Court of the United States

October Term, 1984

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

JEAN KELLEY,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Most of the Metropolitan Statement of the Case is correct. Those few corrections or additions that are necessary are set out as follows:

1. Metropolitan states that "In late 1969, Mr. Kelley had renewed his relationship with a woman living in For-

est Grove, Oregon." Metropolitan Brief, Page 3. The woman testified at trial in 1973 and was deposed in 1980. She testified on both occasions that she had neither seen nor heard from Richard Keith Kelley since prior to his unexplained disappearance in April, 1970.

2. Following the unexplained disappearance of Richard Keith Kelley in April, 1970, two private investigators were hired to locate him. No evidence concerning Richard Keith Kelley following his disappearance has been found. No one has come forward with any evidence that Richard Keith Kelley has been seen or heard from since his disappearance in 1970.

3. When the Court of Appeals, in September, 1980, reversed and remanded the 1978 Summary Judgment issued by Judge Curtis, it ruled that "Kelley submitted evidentiary affidavits on [the issue of death] which, in addition to the aforementioned presumption, effectively established the fact of Mr. Kelley's death." Metropolitan Petition, Appendix B.

4. On February 6, 1981, Metropolitan and Kelley both consented to proceed before a United States Magistrate and take any appeal to the District Court. Appendix A.

———o———

REASONS FOR DENYING THE WRIT

1. Whether (A) The Decisions Below Are Contrary To The Decisions From Other Courts, (B) There Is Need For A Uniform Rule On Point, Or (C) The Case At Bar Involves Principles Which Are Of Importance To The Public At Large Or Concern Only The Parties To This Case.

Petitions for certiorari are brought pursuant to 28 U.S.C. §1254. Certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or those involving substantial constitutional questions. *Zucht v. King,* 260 U.S. 174, 176, 67 L.Ed. 194, 43 S. Ct. 24, 25 (1922); *Fields v. U.S.,* 205 U.S. 292, 296, 51 L.Ed. 807, 27 S. Ct. 543 (1907). Certiorari will be granted to review a judgment when it is contrary to decisions from other courts, and there is need for a uniform rule on point. *Commissioner v. Bilder,* 369 U.S. 499, 501, 8 L.Ed. 2d 65, 82 S. Ct. 881 (1962). Certiorari is granted only in cases involving the resolution or settlement of principles which are of importance to the public at large, as distinguishable from the parties to the case. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955); *NLRB v. Pittsburg S.S. Co.,* 349 U.S. 498, 95 L.Ed. 479, 71 S. Ct. 453 (1951).

In the case at bar, Federal District Court Judges McNichols and Quackenbush, in their capacity as appellate judges, did not make new law at odds with decisions in other courts or a uniform course of decisions previously decided; they did not address the issue of the constitutionality of any state or federal statute; they did not decide a case of grave, general importance. As such, and on the authority cited, certiorari should be denied.

2. Whether The Federal Courts' Failure In A Diversity Action To Provide Standards For The Review By Article III Judges Of Proceedings Before A Magistrate Under 28 U.S.C. § 636 Violates Article III Of The U.S. Constitution And Denies Due Process To Defendant.

Metropolitan has not challenged the constitutionality of the Federal Magistrate Act, 28 U.S.C. §631, et seq, the

constitutionality of which has been upheld by this Court. *See U.S. v. Raddatz,* 447 U.S. 667, 65 L.Ed. 2d 424, 100 S. Ct. 2406 (1980). Nor does Metropolitan claim that it was required, over its objection, to have this matter tried by a magistrate and to take an appeal to the District Court. Metropolitan voluntarily consented to proceed before a magistrate and to take any appeal to the District Court. Appendix A. Appeals from a magistrate may be taken to a judge of a district court in the same manner as on an appeal from a judgment from a district court to a court of appeals. 28 U.S.C. §336 (c)(4). An appeal from a district court to a court of appeals is taken pursuant to 28 U.S.C. §1291.

The gravamen of the claim made by Metropolitan for granting the writ is that it was not afforded adequate notice of grounds for review of the magistrate's decisions. Metropolitan relies on *Northern Pipeline Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 73 L.Ed. 2d 598, 102 S. Ct. 2858 (1982), which case dealt with the issue of jurisdiction of the bankruptcy courts. *Northern Pipeline Co. v. Marathon Pipe Line Co.* had absolutely nothing to do with the Federal Magistrate Act or consents to proceed before a magistrate and is distinguishable from the case at bar.

On June 10, 1981, the magistrate entered judgment granting Metropolitan's Motion to Dismiss. Kelley took an appeal from that judgment to the District Court. On October 9, 1981, counsel for Metropolitan and Kelley had a telephone conference with Judge Robert J. McNichols to discuss the procedure to follow in the appeal. The clerk's office in the District Court, Eastern District of Washington, has a record of that conference call. No transcript or recording of the telephone conference was made. Kelley filed her appeal brief on October 26, 1981. On November

12, 1981, an agreed order for extension of time for Metropolitan to file its brief was filed with the Court. On November 30, 1981, Metropolitan filed its brief.

Oral argument via telephone conference with Judge McNichols was held on January 3, 1982. A Memorandum and Order was filed by Judge McNichols on January 15, 1982. Appendix D, Metropolitan Brief.

On February 1, 1982, Metropolitan filed a Notice of Appeal with the Court of Appeals, Ninth Circuit. It was treated as a Petition for Leave to Appeal. On June 10, 1982, the Court of Appeals, Ninth Circuit, filed an Amended Order, which set out a briefing schedule for the parties. In addition, the Order referenced Ninth Circuit R30, which sets forth the procedure to be followed for discretionary appeals pursuant to 28 U.S.C. §636 (c)(5). Appendix B. Metropolitan and Kelley both filed memoranda with the Court. On August 10, 1982, the Ninth Circuit filed an order denying the Metropolitan Petition for Permission to Appeal.

Trial was held in June, 1983. On June 9, 1983, the magistrate entered an Order on Jury Verdict. Metropolitan filed a Notice of Appeal to the Court of Appeals, Ninth Circuit, on July 1, 1983. On July 13, 1983, Kelley filed a Notice of Cross Appeal with the District Court, Eastern District of Washington. On July 21, 1983, Judge Justin L. Quackenbush, of the District Court, Eastern District of Washington, ordered that, pursuant to stipulation signed by Metropolitan and Kelley, the appeal would be taken to the District Court. On October 7, 1983, on signed stipulation of Metropolitan and Kelley, the Court of Appeals, Ninth Circuit, filed an order dismissing the appeal to the Ninth Circuit.

Judge Quackenbush, in his capacity as an appellate judge, entered an order on November 18, 1983, setting out the appeal schedule, and ordered that the appeal would "proceed in the manner prescribed in the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Ninth Circuit." Appendix C. Subsequently, Metropolitan was granted two extensions of time to file its brief. When its brief was filed, Metropolitan made twenty assignments of error. No reference of any kind was made that Metropolitan had been denied due process by virtue of not being afforded adequate notice of grounds for review of the Magistrate's decisions.

Oral argument was held on March 30, 1984. On June 20, 1984, Judge Quackenbush affirmed the rulings of the Magistrate and jury verdict. Metropolitan filed a Motion for Consideration which was heard by telephone conference on July 24, 1984. The motion was denied on July 26, 1984.

Metropolitan filed a Petition for Leave to Appeal to the Court of Appeals, pursuant to 28 U.S.C. §636 (b)(5), on November 5, 1984. Briefs were submitted by Metropolitan and Kelley. On October 9, 1984, the Court of Appeals, Ninth Circuit, entered an Order Denying Petition for Leave to Appeal.

Metropolitan has been afforded and has utilized all process that it is due. All issues, legal and factual, have been exhaustively researched, briefed, argued and appealed. Kelley and Metropolitan both took appeals from the magistrate to the District Court in its capacity as an appellate court. Metropolitan filed two petitions for leave to appeal with the Court of Appeals, Ninth Circuit. The petitions were timely filed, briefed and denied, for the

reason that Metropolitan failed to demonstrate that the issues on appeal were substantial enough to warrant review or that review was necessary to serve the ends of justice. How can Metropolitan now claim, in light of this procedural history, that it has been denied due process?

3. Decisions Below Did Not Fail To Give Full Faith And Credit To The Decision Of A State Court For The Reason That State Law Allowed Kelley To Relitigate Her Case. Full Faith And Credit Need Not Be Given To A Judgment To Which The Laws Of The Issuing State Would Not Give Res Judicata Effect.

It does not violate Article IV, §1 of the United States Constitution, or 28 U.S.C. §1738, to refuse to give res judicata effect to a judgment of a state court that is itself not res judicata to a subsequent action. *See, e. g., Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270, 65 L.Ed. 2d 757, 100 S. Ct. 2644, 2655 (1980); *Ackerman v. Ackerman*, 676 F.2d 898 (2d Cir. 1982).

In support of its full faith and credit claim, Metropolitan cites *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 72 L.Ed. 2d 262, 102 S. Ct. 1883 (1982). That case does not articulate a categorical rule for all cases. It reasons only that a final judgment on the merits prevents a party from relitigating issues that were or could have been raised in the earlier action. In the case at bar, application of Or. Rev. Stat. §40.130 (Evidence Code Rule 311), the Seven Year Presumption of Death, and the Order of the Court of Appeals, Ninth Circuit, dated September 10, 1980, which held that Richard Keith Kelley was dead, created burdens of proof and legal issues that were not and could not have been raised in the 1972 action.

Metropolitan argues that the 1973 judgment was res judicata to the 1977 action. According to Oregon law, the appropriate test to be used to decide the issue of res judicata is "the same evidence test." According to that test, it must be decided "whether the second action is based upon the same transaction and the evidence needed to sustain the second action would have sustained the first." *Western Baptist Home Mission Board v. Griggs,* 284 Or. 204, 210, 433 P.2d 252, 255 (1967). The 1983 Kelley trial did involve the "same transaction" as the 1973 trial. However, because Mr. Kelley was presumed dead at the time of the 1983 trial (in fact, *was dead* according to the mandate of the Ninth Circuit), the evidence needed to sustain the 1983 trial was different than the 1972 action. Therefore, the 1972 action was not res judicata to the 1983 trial. *See Segal v. American Telephone & Telegraph Co., Inc.,* 606 F.2d 842, 845 (9th Cir. 1979); *Newport News Shipbuilding & Dry Dock v. Director,* 583 F.2d 1273, 1279 (4th Cir. 1978), *cert. denied,* 440 U.S. 915, 59 L.Ed. 2d 465, 99 S. Ct. 1232 (1979).

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 69 L.Ed. 2d 103, 101 S. Ct. 2424 (1981), cited by Metropolitan, is distinguishable from the case at bar. That case did not involve a second action with different evidentiary predicates. It involved a failure to appeal and an exception to the finality of a party's failure to appeal. Under the facts of that case, the Supreme Court argued that "This Court's rigorous application of res judicata . . . makes clear that this Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely

interwoven' with those of another party." 452 U.S. at 400.

The case at bar does not involve a party's failure to appeal. This case involves a change in the burden of proof, changes in applicable rules of evidence, and application of Oregon law that recognizes situations wherein res judicata is not a bar. *Western Baptist Home Mission Board v. Griggs,* 284 Or. 204, 210, 433 P.2d 252, 255 (1967).

Metropolitan never took an appeal, or filed a Petition for a Writ of Certiorari, following issuance of the Court of Appeal's Order filed September 20, 1980, which order held that Richard Keith Kelley was dead. That September 10, 1980 Order was the law of this case in 1983. *Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 833 (9th Cir. 1982). It had to be followed in all subsequent proceedings in the same case at either the trial or appellate levels. *Planned Parenthood of Central and Northern Arizona v. State of Arizona,* 718 F.2d 938, 949 (9th Cir. 1983). The magistrate and the District Court were required to follow the holding of the Ninth Circuit "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues or the decision was clearly erroneous and would work a manifest injustice." *Planned Parenthood of Central and Northern Arizona v. State of Arizona,* 718 F.2d at 949 (citation omitted). Since none of these three exceptions applied to the case at bar, Magistrate Myers and Judge Quackenbush both held that the ruling of the Court of Appeals, Ninth Circuit, would stand and that the fact of Richard Keith Kelley's death should be, or was properly, excluded from the 1983 trial.

This Court should deny review. Metropolitan was not denied due process and the lower courts have not refused to give full faith and credit to the decision of an Oregon court.

———o———

CONCLUSION

For the reasons discussed above, the Metropolitan Petition for Writ of Certiorari should be denied. The case at bar is not one of particular gravity or general importance. The decisions of the lower courts are not contrary to decisions from other courts, nor is there need for a uniform rule on point. In addition, the issues sought to be resolved by Metropolitan involve only the parties to this case and are of no importance to the public at large. Furthermore, Metropolitan has utilized all procedures available to it and has not been denied due process. Full faith and credit need not be given to the 1973 Oregon judgment for the reason that Oregon law recognizes that the judgment should not be given res judicata effect.

DATED this 18th day of January, 1985.

Respectfully submitted,

/s/ James K. Hayner

/s/ Tom Scribner

James K. Hayner
Tom Scribner
Minnick, Hayner & Zagelow, P.S.
P.O. Box 1757
Walla Walla, Washington 99362

Counsel of Record

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-77-159

JEAN KELLEY,

Plaintiff(s),

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,

Defendant(s).

CONSENT TO PROCEED BEFORE
A UNTED STATES MAGISTRATE

(Filed February 6, 1981)

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above-captioned civil proceeding hereby waive their right to proceed before a Judge of the United States District Court and consent to have Magistrate Smithmoore P. Myers conduct all further proceedings in the case, including the trial of the case, and order the entry of judgment.

The parties are aware of the fact, that unless they now stipulatc to take any appeal to a judge of the District Court, any appeal from the judgment lies directly to the United States Court of Appeals for this Circuit in the same manner as an appeal from any other judgment of the District Court. The parties in this case agree to take any appeal to the District Court.

MINNICK, HAYNER &
ZAGELOW, P.S.

/s/ James K. Hayner
Of Attorneys for Plaintiff
2/5/81
William M. Tugman
Attorney for Defendant
Attorneys
11/10/80

* * *

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to the office of the United States Magistrate Smithmoore P. Myers. The Magistrate will conduct all further proceedings and enter judgment in accordance with 28 U.S.C. § 636(c) and the foregoing consent of the parties.

/s/ Smithmoore P. Myers
United States District Judge
2/6/81

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 82-3076

DC# CV 77-159 M
Eastern Washington (Seattle)

JEAN KELLEY,

Plaintiff-Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,

Defendant-Appellant.

Before: ANDERSON and ALARCON, Circuit Judges

AMENDED ORDER

(Filed June 10, 1982)

The court's order of May 27, 1982 is amended to read as follows:

It appears that the parties consented pursuant to 28 U.S.C. § 636(c) to a trial before a magistrate and an appeal to the district court. 28 U.S.C. § 636(c)(5) requires that a petition for leave to appeal be filed in this court if a party desires further judicial review.

9th Cir. R. 30 sets forth the procedure to be followed for discretionary appeals pursuant to 28 U.S.C. § 636 (c)(5). Because this rule became effective after the notice of appeal was filed, the court treats the notice of appeal filed by defendant on February 1, 1982 as a petition for leave to appeal. On or before fourteen (14) days from the entry of this order, defendant shall file a memorandum in

support of the petition. On or before seven (7) days after the memorandum in support of the petition is filed, plaintiff shall file a memorandum of response. The briefing schedule previously established for the appeal shall be held in abeyance pending the court's consideration of the petition and memoranda.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-77-159-JLQ

METROPOLITAN LIFE INSURANCE COMPANY, a New York Corporation,

Appellant, Cross-Appellee

vs.

JEAN KELLEY,

Appellee, Cross-Appellant

ORDER

(Filed November 18, 1983)

A telephonic conference was held on November 18, 1983. The appellant was represented by William Tugman; Tom Scribner appeared on behalf of appellee.

This matter shall proceed as follows:

1. Appellant shall serve and file its brief on or before December 30, 1983.

2. Appellee shall file her response and brief in support of her cross-appeal on or before January 30, 1984.

3. On or before February 13, 1984, appellant shall serve and file its reply brief and response to the cross-appeal.

4. Appellee shall file her reply to appellant's response brief on or before February 27, 1984.

5. Oral arguments will be heard in Spokane, Washington, at 10:00 A.M., March 30, 1984. Argument will be limited to a total of thirty (30) minutes per party.

6. This appeal shall proceed in the manner prescribed in the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals For The Ninth Circuit.

7. All briefs and other papers shall be captioned and numbered as set forth in this Order.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 18th day of November, 1983.

/s/ Justin L. Quackenbush
United States District Judge